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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

COUNTY OF NAPA,

Plaintiff, Cross-defendant and
Appellant,

v.

DAVID D. WESNER et al.,

Defendants, Cross-
complainants and Respondents.

A162794

(Napa County
Super. Ct. No. 26-59313)

The County of Napa (County) appeals the trial court’s postjudgment award of attorney fees and costs. The County contends the trial court abused its discretion when it reduced the amount of attorney fees and costs awarded. Defendants David D. Wesner, Janice L. Wesner, and Don Wesner, Inc. (collectively the Wesners) argue the appeal is untimely and must be dismissed. We conclude we must dismiss the appeal for lack of jurisdiction.

I. BACKGROUND

This is the fourth appeal in this case. The historical and procedural facts have been set forth in our prior opinions, which we incorporate by reference.¹ We will only discuss the facts relevant to the issue before us.

¹ *County of Napa v. Wesner* (Mar. 17, 2017, A146886) [nonpub. opn.] (*Wesner II*); *County of Napa v. Wesner* (Jun. 24, 2019, A154839) (*Wesner III*)

The underlying dispute in this appeal concerned the County’s lawsuit for rescission of a settlement agreement entered by the parties in 2009 to resolve a nuisance on the Wesners’ property. In a 2013 bench trial, the trial court found in favor of the County on its causes of action for declaratory relief, against the County on its causes of action for public and private nuisance, and reserved jurisdiction to determine the Wesners’ entitlement to rescissionary damages. In a series of orders, the trial court entered (1) a “judgment” in favor of the County in November 2013; (2) an award of attorney fees for \$128,965.37 in favor of the County in January 2014; and (3) an award of rescissionary damages in the amount of \$20,030 in favor of the Wesners in May 2014.

The Wesners subsequently appealed from various orders entered by the trial court in 2015. In *Wesner II*, *supra*, A146886, we dismissed the appeal as to two of those orders, finding the trial court had never entered final judgment. We urged the trial court to enter judgment as soon as possible. The trial court subsequently did so in January 2018. That judgment awarded the County \$128,965.37 in fees and costs, but taking into account the prior \$20,030 restitution award to the Wesners, the County was to receive \$108,935.37.

The Wesners filed another appeal, arguing that the trial court erred in awarding attorney fees to the County because the fee motion had been prematurely determined in January 2014, before the trial court entered final judgment and before it had resolved the Wesners’ entitlement to rescissionary damages. We agreed the award was premature, and in *Wesner III*, *supra*, A154839, reversed only the attorney fee award, ordering the trial

[nonpub. opn.]. The first appeal, case No. A141042, was dismissed by order of this court in 2014.

court to modify the judgment accordingly. We noted the disposition was without prejudice to the County filing a motion for attorney fees on remand.

In November 2019, following issuance of the remittitur in *Wesner III*, the County filed a motion for prevailing party determination. The trial court found that the County was the prevailing party on the contract pursuant to Civil Code section 1717. The County then filed its motion for attorney fees and costs, seeking a total award of \$281,359.44. Following a hearing, the trial court issued a detailed order on September 30, 2020 (September 30 order), awarding the County \$27,686.54 in attorney fees and costs. The same day, the trial court clerk served a filed-endorsed copy of the September 30 order on all parties by mail.

In March 2021, the County submitted a proposed judgment to the court memorializing the \$27,686.54 award as contained in the September 30 order. The trial court issued an order directing the Wesners to file any objections or their own proposed judgment on or before March 29, 2021. The Wesners filed an objection to the proposed judgment stating that the court had no further jurisdiction because the County failed to timely appeal from the September 30 order.

On April 6, 2021, the trial court filed a proposed judgment, subject to the parties filing any objections within 10 days. The proposed judgment (1) restated the substance of the January 2018 final judgment minus the two paragraphs regarding the attorney fees order we ordered stricken in *Wesner III*; (2) noted the Wesners had filed a memorandum of costs on appeal in the amount of \$1,156.90 after being awarded costs on appeal; (3) summarized the trial court's September 30 order awarding the County \$27,686.54 in attorney fees and costs; and (4) stated the County was entitled to a net recovery of \$6,499.64 after taking into account the Wesners' \$20,030

restitution award and appellate costs in the amount of \$1,156.90. The Wesners reasserted their prior objections that the court lacked jurisdiction because the County failed to timely appeal from the September 30 order.² On April 26, 2021, the trial court entered an amended judgment after appeal in substantially the same form as its proposed judgment. On June 1, 2021, the County filed a notice of appeal.

II. DISCUSSION

The Wesners contend the appeal is untimely because the County failed to file its notice of appeal within 60 days of the September 30 order awarding attorney fees and costs. Because the notice of appeal was not filed until June 1, 2021, the Wesners argue the appeal must be dismissed.

“A postjudgment order which awards or denies costs or attorney’s fees is separately appealable[] [citations], and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it.” (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46; see Code Civ Proc., § 904.1, subd. (a)(2); *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651–656.) Here, final judgment was entered on January 26, 2018, following issuance of the remittitur in *Wesner II, supra*, A146886. In *Wesner III, supra*, A154839, we concluded the trial court’s award of attorney fees contained in the 2018 final judgment was premature, and ordered the judgment modified to strike *only* the portion of the judgment pertaining to attorney fees, without prejudice to further proceedings to resolve the fees issue. The sole issue left for adjudication was the determination of attorney fees. The September 30 order awarded the County \$27,686.54 in attorney fees and costs and contained no language suggesting any further action would be taken or any issue remained unresolved. (See

² The County did not file any objections.

Laraway v. Pasadena Unified School Dist. (2002) 98 Cal.App.4th 579, 583 (*Laraway*) [order was appealable where “it contemplated no further action, such as the preparation of another order or judgment [citations], and disposed of all issues between all parties”].) Thus, the September 30 order was a separately appealable postjudgment order.³ (Code Civ. Proc., § 904.1, subd. (a)(2).) If no timely appeal was taken from the order, the appeal must be dismissed. (*Krug*, at p. 46 [“ ‘If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.’ ”].)

California Rules of Court, rule 8.104(a)(1) controls the determination of the timeliness of the appeal and states as follows: “Unless a statute or rules 8.108, 8.702, or 8.712 provide[] otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) [¶] (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled ‘Notice of Entry’ of judgment or a filed-endorsed copy of the judgment, showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment.” The term “ ‘judgment,’ ” for purposes of rule 8.104(a), includes an appealable order. (Cal. Rules of Court, rule 8.104(e).)

“ ‘Compliance with the time for filing a notice of appeal is mandatory and jurisdictional.’ ” (*Conservatorship of Townsend* (2014) 231 Cal.App.4th 691, 700.) Absent statutory authorization to extend the jurisdictional period, if the notice of appeal is not actually or constructively filed within the

³ The County does not argue otherwise.

appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss it. (*Id.* at pp. 700–701.)

Here, the trial court clerk mailed a filed-endorsed copy of the attorney fees order to both parties on September 30, 2020. Accordingly, the County had to file its notice of appeal within 60 days, by November 30, 2020. (Cal. Rules of Court, rule 8.104(a)(1)(A); Code Civ. Proc., §§ 12, 12a.) Because the County did not file its notice of appeal until June 1, 2021, the appeal is untimely and we lack jurisdiction to consider it.

The County contends its appeal is timely because it timely appealed from the April 2021 amended judgment. But “[o]nce a final, appealable order or judgment has been entered, the time to appeal begins to run.” (*Laraway, supra*, 98 Cal.App.4th at p. 583 [judgment entered five months after appealable order did not restart clock on appeal].) “The Rules of Court do not provide . . . that the time to appeal can be restarted or extended by the filing of a subsequent judgment or appealable order making the same decision.” (*Ibid.*) Here, the trial court’s “Amended Judgment After Appeal” merely reiterated the January 2018 final judgment and calculated the net amount due to the County based on the September 30 order and prior awards of rescissionary damages and appellate costs to the Wesners. Because it did nothing to alter the substance of the appealable September 30 order, it could not restart the time to appeal.

In arguing its appeal was timely, the County relies on *Bi-Coastal Payroll Services, Inc. v. California Ins. Guarantee Assn.* (2009) 174 Cal.App.4th 579 (*Bi-Coastal*), and its discussion of the Supreme Court case of *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894 (*Alan*). In *Bi-Coastal*, the court clerk’s service of a minute order did not trigger the 60-day period for filing a notice of appeal because the minute order was

neither entitled “ ‘Notice of Entry’ of Judgment [or order] ” nor file stamped as required under California Rules of Court, former rule 8.104(a)(1). (*Bi-Coastal*, at p. 586.) Similarly, in *Alan*, the high court held that an appealable minute order did not commence the 60 days to file a notice of appeal because it was not entitled “ ‘Notice of Entry’ ” nor file stamped. (*Alan*, at p. 905.)

The County argues that the September 30 order did not trigger the 60-day deadline to file a notice of appeal because it did not contain the language “Notice of Entry.” But unlike in *Alan* and *Bi-Coastal*, the court clerk here served both parties a filed-endorsed copy of the September 30 order, triggering the 60-day deadline to file a notice of appeal. (Cal. Rules of Court, rule 8.104(a)(1)(A); see *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 659–660 [as an *alternative* to the “ ‘Notice of Entry’ ” requirement, a file-stamped copy of an appealed judgment or order need not be titled “ ‘Notice of Entry’ ”].)

In any event, even if the County were right that the 60-day deadline was not triggered by the clerk’s service of the filed-endorsed copy of the appealable order, the County would still be required to file its appeal within 180 days of September 30, 2020, by March 29, 2021. (Cal. Rules of Court, rule 8.104(a)(1)(C).) The County did not file its notice of appeal until June 1, 2021. Accordingly, even assuming the most generous deadline applied, the County’s appeal was untimely. Because the notice of appeal was not filed within the appropriate filing period, we are without jurisdiction to determine the merits of the appeal and must dismiss it.

III. DISPOSITION

The appeal is dismissed for lack of jurisdiction. The parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

MARGULIES, ACTING P. J.

WE CONCUR:

BANKE, J.

WISS, J.*

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* Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.